United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

B
P/S

74-2373

To be argued by
LOUIS BENDER

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

vs.

ELMER E. HORNBERGER,

Appellant.

On Appeal from Judgment of Conviction, 26 U.S.C. §§7201 and 7206(1); E. D. N. Y., Before Mishler, J. and a Jury

APPELLANT'S REPLY BRIEF

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APPELLANT'S REPLY BRIEF

I

The Government makes assertions of facts for which there is no evidence, direct or circumstantial, in the record. The possibility that such strong statements of appellant's culpability might be unduly provocative and might color his chances on this appeal prompts us to question their accuracy and to note them.

The Government in its statement of facts says that the deposit entries in the checkbooks of the corporations constituted the sole source of information used to determine the corporate income and that appellant was fully aware of this procedure for recording income according to his book-

keeper and his accountant (Government's brief, p. 4). The Government cites for the bookkeeper's testimony 126a-130a of the Appendix to the brief. There is no such testimony by the bookkeeper Coletti. The Government further cites for this proposition 233a-234a and there is no such testimony by the Government witness Paterno who was the assistant to the accountant Canale. The Government further cites 298a-299a and there is no such testimony by the accountant Canale. Canale testified that he had a general discussion with appellant prior to 1967 with respect to Canale's need to have the corporate bank statements, cancelled checks, and checkbook stubs, but he never testified that appllant was aware that the sole source of the corporate taxable income was the deposit entries in the checkbooks. On the contrary, he was asked:

> "Q Did you ever tell Mr. Hornberger how you were preparing the corporate income tax returns -- that is the way in which you obtained the information or the source of the moneys?
>
> A Prior to '67 and '68?
>
> Q In 1967 and 1968 or prior thereto?
>
> A No, I probably never did." (328a-329a)

On redirect by the Government he said exactly the same thing (364a).

The Government stated:

> "Appellant knowingly discarded the 'waterlogged' checkbooks into the garbage without advising IRS of the flood." (Government's brief, p. 6, fn.)

Special Agent Mazzella, who testified for the Government, admitted that in October, 1972, appellant advised him that the records were lost in the flood which occurred during 1972, and Mazzella further admitted that he made no attempt to verify whether the flood occurred (975a).

The Government makes further references to evidence in the footnote on page 19 of its brief in answering appellant's argument in Point II that the Regional Counsel's report reflected matters as to corporate earnings and profits, none of which is in the record below.

II

As to appellant's Point I in the brief, the Government says that appellant's claim that the trial Court failed to charge the defense theory of the case as requested is wrong because of three reasons:

1. The trial Court did in fact charge the jury on the defense theory of the case.

2. The trial Court was not required to prove every contention in support of the defense theory.
3. The trial Court properly charged on knowledge and intent. (Government's brief, p. 9)

The Government offers support for the first two reasons by setting forth a portion of the Court's charge on part of appellant's testimony that appellant claimed he was unaware that the taxes had not been paid by the corporations on the extras and was unaware that the redeposits from his personal accounts to the corporation's had been entered as credits to his loan account, and further that appellant claimed he was a busy man who did not examine his books or returns or discuss with his accountant how the extras were treated on the corporate books by his accountant. These portions of the trial Court's charge, the Government argues, was the submission of the appellant's theory of his defense and that what appellant requested was merely a contention in support of that theory of defense which was properly rejected by the trial Court, citing Laughlin v. United States, 385 F.2d 287, 294 (D.C.Cir. 1967), affirmed on subsequent appeal, 474 F.2d 444, 454-455 (D.C.Cir. 1972).

The Government has it in reverse, we submit, and in so doing seeks to avoid the impact of this Court's opinions in United States v. O'Connor and United States v. Platt, as well as the other decisions cited in appellant's main brief (pp. 22-25), none of which the Government mentions, disputes, or distinguishes.

Without repeating appellant's theory of his defense (set forth in the main brief at pp. 9-10 and 15-19), appellant engaged in conduct which to a jury had all the earmarks of concealing corporate income unless his purpose in so doing, which he believed was innocent and without tax evasion motive, was explained to the jury in language which permitted the jury to evaluate such conduct in determining appellant's guilt or innocence.

After a summation by the Government which attacked the purpose advanced by appellant for directing that the extra checks be paid to him as illegitimate and for no other reason other than to evade his taxes (the Government's summation set forth in main brief, pp. 25-27), and the trial Court's charge that the Government claims that appellant's direction to the home buyers to pay him the extras was a plan or scheme to cheat the Government (1090a), it was

incumbent upon the trial Court to submit to the jury that appellant's conduct was not improper or criminal if they believed the purpose for which appellant said he had engaged in such seemingly criminal conduct as the Government claimed. Without such an instruction the jury had no reason to know that such conduct could have been innocent even if they believed the appellant.

Appellant's theory of the case was not simply a denial of guilt which was all that the trial Court supplied the jury from a portion of appellant's testimony, and which, incidentally, was all that was involved in Laughlin v. United States (first opinion) cited by the Government.* Indeed, this distinction is more forcefully noted in the subsequent decision in Laughlin where the D. C. Circuit explained the reason for its earlier decision as follows:

> ". . . but a claim that the jury should be instructed to acquit the defendant if the defense testimony denying guilt is believed can hardly be elevated to the status of a 'theory.' What is required before the theory of the case rule comes into play is a more involved theory involving 'law' or fact, or both, that is not so obvious to any jury. This was the gist of our

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* It is to be also noted that the request to charge in Laughlin came after the charge had been given completely, unlike the instant situation.

> earlier holding on this point (128 U.S.App. D.C. at 34 n. 4, 385 F.2d at 194 n. 4)." 474 F.2d supra at 455.

If anything, the D. C. Circuit opinion supports appellant's contention that it was error to fail to charge the jury on appellant's theory of claimed innocence in engaging in seemingly criminal conduct which, if the jury believed, should acquit him and which without such a charge, innocence would not be "so obvious to any jury". Laughlin v. United States, 474 supra at 455. Appellant's theory of the defense, it is submitted, was more like the situation in Levine v. United States, 261 F.2d 747, which the D. C. Circuit in its first opinion distinguished in Laughlin v. United States, 385 F.2d supra at 294, n. 4 (Levine v. United States was cited in appellant's main brief at p. 28).

That the charge given by the trial Court as to the quoted portion of the appellant's testimony (Government's brief p. 10) was not the appellant's theory of the case and was not intended to be such is evident from what the trial Court said when he denied appellant's request to do so, as set forth in appellant's main brief at pp. 16-19, as for example:

> "But I will tell you this, nothing that I have to say is going to indicate that the defendant

took this money intending to hold it as corporate funds . . ." (916a-919a)

When specific exception was taken to the trial Court's failure to charge on the appellant's theory of the defense (1132a), the trial Court said, "I gave it in a general way. I am not going to give it to them at this point." (1132a). This statement was inconceivable in view of the fact that appellant had submitted a written request on the appellant's theory of the defense and extensive argument was had on it before the charge (appellant's main brief, pp. 16-19). But that the trial Court simply would not so charge was evident again when he recharged the jury after the exception was taken:

> "THE COURT: I do not know whether I mis-stated a portion of the defendant's testimony and his position, but to make certain that I did not, I would like to repeat what I recall the defendant to have testified to, and what his position is.
>
> Your recollection, incidentally, is what counts and I will tell you shortly, you could just ask for any of the testimony during your deliberations.
>
> The defendant said that he believed that he was paying the taxes on the excesses [extras] that were chargeable to him.
>
> In other words, those that were reported by Story Book Homes, Incorporated for 1967 and 1968, when he signed his individual joint return for 1967 and 1968.

If I didn't say it that clearly before, you now have it." (1133a-1134a)

If anything, this recharge again by further emphasis eliminated the appellant's theory of the defense as meaningful evidence for the jury to consider.

Moreover, even the quoted portion of the charge on appellant's testimony was hardly adequate for it failed to tell the jury what they should do even if they found appellant's testimony credible in the limited respects charged. The jury was not even told that they could acquit appellant if they believed the jury under those circumstances. Thus, the charge in that respect and in the failure to charge on the appellant's theory of his case was reversible error.

III

The Government fails utterly to respond to the failure of the trial Court to submit appellant's Request No. 3 (set out in the main brief at p. 36), and the authorities cited in support of the propriety of that request (Idem. pp. 39-40). Instead, the Government cites three opinions of this Court in support of its claim that the charges given with

respect to appellant's knowledge of the corporate books and records was proper.

None of these Second Circuit Court cases (Frank, Joly, and Sarantos) supports the failure of the trial Court to submit Request No. 3 which was uniquely applicable to the facts in the instant case, unlike the fact situations in the three cases cited. It is thus no answer to cite in support of a charge cases which do not support the failure to give a proper instruction requested.

But even as to the charge given by the trial Court this Court's opinions illustrate the impropriety of the charge. Frank and Sarantos dealt with lawyers who performed services for a client who was defrauded in the one case and made false statements in the other, but in both of which they claimed innocence. In Joly the defendant was charged with possessing cocaine in a package he was carrying which he professed he did not know was cocaine and was illegally imported. In Frank this Court held that lawyers Hemlock and Hoffer could not escape knowledge of the fraud perpetrated on their client by "shutting their eyes to what was plainly to be seen" (494 F.2d 145, 152-153 (2d Cir. 1974)). In Joly this Court upheld

a trial court's charge that knowledge of the contents of the package could be inferred if the defendant deliberately and consciously tried to avoid learning that there was cocaine in the package he was carrying in order to be able to say, should he be apprehended, that he did not know. In Sarantos this Court sanctions the charge of knowledge by an attorney of false statements made by his client to Immigration if he acted with reckless disregard of whether the statements were true and with a conscious effort to avoid learning the truth.

None of these cases involved the instant fact situation where as a matter of business practice a corporate officer leaves the bookkeeping and accounting practices of his business to those entrusted with those functions and who were hired for their expertise in this matter. In such a situation, as the appellant testified, as a businessman with little knowledge of bookkeeping and accounting even if he looked at the records he would scarcely be able to detect what may have been "plainly seen" as in Frank or as in Joly and as in Sarantos. That is why we submit appellant's Request No. 3 was more appropriate in this type of case to determine knowledge by inference than the charge as given or upheld in the fact situations in Frank, Joly and Sarantos.

But even if this Court should consider the rule laid down in those cases as applicable, the charge as given as to appellant's knowledge of his books and records we submit was erroneous. The jury was not told that knowledge could be inferred if the appellant acted with reckless disregard of whether the entries in his books were true and with a conscious effort to avoid learning the truth. United States v. Sarantos, 455 F.2d 877, 882 (2d Cir. 1972). On the contrary, they were told that if appellant had a conscious purpose in avoiding knowing the contents of the books and the matters contained in his tax returns, that is, said the trial Court, if he refused to examine them and look at them knowingly and consciously, that is sufficient to provide an inference of guilty knowledge. But this charge was not the same as a reckless disregard of whether the entries in the books and on the tax returns were true and as a conscious and deliberate effort to avoid learning the truth of their contents; on the contrary, the charge permitted the jury to draw the inference of guilty knowledge even if it appeared that appellant's concious purpose in not examining or looking at the books and the returns was because he was an extremely busy man taken up with his outside activities rather than to avoid learning

the truth of the contents of the books and the contents of his tax returns.

IV

The Government supports the trial Court's action in striking the Rizzi testimony in his charge to the jury as inadmissible hearsay without disputing or even mentioning any of this Court's opinions cited by appellant in support of its admissibility (appellant's main brief, p. 34), It is ironic that the Government asserts appellant, in summation, "overstepped legitimate argument on the evidence" (Government's brief, p. 16) when the Government itself elicited the testimony on direct from its own witness Rizzi (64a, 75a, 77a, 78a, 79a). The Government says it fails to see how the appellant was prejudiced because the jury took five hours to reach a verdict of guilt on all counts. We submit, without repeating what was said in the main brief on this subject (at pp. 32-34) that if the jury took so long to find guilt, it might easily have in less time found innocence if the Rizzi testimony was not stricken and the appellant's theory of his defense was charged as requested.

V

The Government argues that the trial Court did not rule, as appellant contends in Point II of his brief, that the burden of proof in a criminal case under this Court's opinion in DiZenzo was on appellant to show that the corporations did not have sufficient earnings and profits. On the contrary, argues the Government, the trial Court found that a sufficient case of corporate earnings and profits to declare a constructive dividend had been established by the Government with respect to Counts 1 and 2 (Government's brief, pp. 21-22). In addition, says the Government, the trial Court properly restricted the cross-examination of Revenue Agent Vilardi because appellant sought to elicit legal opinions on the provisions of the Internal Revenue Code relating to Vilardi's computations (Ibid.).

Appellant will not repeat the colloquy between the Court and appellant's counsel which unmistakeably discloses that the trial Court did what appellant said it did (673a-674a). But whether appellant or the Government is correct in their interpretation of the trial Court's ruling, the fact is that the Government does not urge in this Court that under DiZenzo the Government had no burden to prove initially the

the existence of earnings and profits. The Government urges instead that its proof demonstrated that except for Horn Enterprises in 1968, each corporation had sufficient earnings and profits to support the income charged to appellant as constructive dividends under Counts 1 and 2 and that Vilardi, its expert, so testified (Government's brief, pp. 20-21).

The Government, it is submitted, is simply inaccurate. Vilardi never testified that he made the computations based upon Sections 301 and 316 of the Internal Revenue Code and in fact said he did not know what Section 316 was (649a). It was for this reason appellant sought to strike his testimony (649a-650a), which, it is submitted, should have been granted.

Equally inaccurate is the Government's contention that the corporate tax returns in evidence reflected sufficient earnings and profits "notwithstanding the 'extras' income which had been unreported." (Government's brief, p. 21). Dotal Building Corporation as of December 31, 1967 had retained earnings of $2,849.92, which was hardly sufficient to construct a dividend in 1967 of $5,418.34 charged to appellant.

In 1968 it had retained earnings of $592.72, again insufficient to construct a dividend of $14,221.91. Horn Enterprises had retained earnings as of December 31, 1967 of $4,452.90, again insufficient to construct a dividend of $15,426.00. In 1968 Horn had a loss of $104.82, which was insufficient to construct a dividend of $1,030.00. The Government concedes this loss but somehow seeks to avoid it by referring to the unrealistic figure of $4,348.08 which fails to take into consideration that there was an actual loss for that year of $104.82. In Story Book Manor the retained earnings as of December 31, 1967 were $9,210.54, again insufficient to construct a dividend of $11,241.35. Similarly, in 1968 Story Book Manor had retained earnings of $1,619.42, clearly inadequate to construct a dividend of $37,049.50.

The corporate tax returns in evidence thus do not support the Government's contention that sufficient earnings and profits existed to construct the dividends charged to appellant "notwithstanding the 'extras' income which had been unreported."

The Government, however, is correct in its statement (Government's brief, p. 21, fn.) that the omitted corporate income should be added back to earnings and profits.

It is incorrect, however, in saying that Vilardi so testified that he did in computing earnings and profits (citing 648a-649a). The record references do not support any such testimony. In fact, Vilardi never so testified since he neither considered Section 316 of the Internal Revenue Code in his computations nor whether sufficient earnings and profits existed to construct a dividend. The fact is, however, that adding the omitted income back to the corporate earnings does not alter the picture since the same amount of omitted income has to be taken out to reduce earnings and profits when distributed to the stockholder. C.I.R. v. Goldwyn, 175 F.2d 641, 644 (9th Cir. 1944). Moreover, the Government fails to answer appellant's contention that the earnings and profits of the corporations must be reduced by the proposed deficiencies in tax and additions to tax such as penalties and income (main brief, pp. 43-44; see also William H. Kenner, et al., T.C.Mem. 1974-273, P.H.Memo T.C. at 1191, and cases cited). The Government failed utterly below to prove through Mr. Vilardi what those proposed deficiencies and additions to tax were, which almost invariably are much larger that the criminal figures since they involve additional non-fraud items reserved for subsequent civil action.

It is thus submitted that the Government failed to sustain its burden in proving that more than half of the extra payments charged to appellant as income under Counts 1 and 2 was income on which appellant owed the taxes charged. Sufficient error, it is submitted, existed to affect all the remaining counts. Cf. United States v. Barash, 365 F.2d 395, 399 (2d Cir. 1966).

CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed and a judgment of acquittal entered, or a new trial ordered.

Respectfully submitted,

LOUIS BENDER,
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No. 74-2373

UNITED STATES OF AMERICA,

v.

ELMER E. HORNBERGER,
Appellant.

APPELLANT'S REPLY BRIEF

AFFIDAVIT OF MAILING

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

Richard Franks,

being duly sworn, deposes and says: that he is over twenty-one years of age; that on the 8th day of January 19 75 he served the annexed Reply Brief by depositing on said 8th day of January, 19 75 2 true copies of said Reply Brief, duly enclosed in a postpaid and sealed wrapper, certified mail, return receipt requested, in an official post office duly maintained and and operated by the Government of the United States at Church Street Station Borough of Manhattan, New York City, and addressed to:

Hon. Robert A. Morse
U.S. Attorney
Federal Court House
225 Cadman Plaza East
Brooklyn, New York

that being the address within that State designated by him on the previous papers in this action as the place where he then kept an office for the regular transaction of business, between which place there then was and now is regular communication by mail.

Richard Franks

Sworn to before me this 8th day of January 19 75.

Edith G. Zuerling

EDITH G. ZUERLING
NOTARY PUBLIC, State of New York
No. 31-0815500
Qualified in New York County
Commission Expires March 30, 1975